

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for mandates in the nature of Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 370/2017

Beverly Palihawadana,
No. 20/3, 2nd Lane,
Koswatta Road, Nawala, Rajagiriya.

PETITIONER

Vs.

1. W.I.D.R. Weerakoon,
Assistant Commissioner of Labour,
Department of Labour, Colombo 5.
2. R.P.A. Wimalaweera,
Commissioner General of Labour,
Department of Labour, Colombo 5.

RESPONDENTS

Before: Arjuna Obeyesekere, J / President of the Court of Appeal

Counsel: Lasantha Hettiarachchi with Ms. Sara Miskin and Himath Silva for the
Petitioner

Ms. Ganga Wakishtarachchi, Senior State Counsel for the
Respondents

Argued on: 18th June 2020

Written Submissions: Tendered on behalf of the Petitioner on 10th January 2019 and 26th
June 2019

Tendered on behalf of the Respondents on 11th June 2019 and 13th
August 2020

Decided on: 3rd June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner states that she was an employee of the Food and Agriculture Organisation of the United Nations Office in Colombo (the FAO) during the period April 1998 to September 2011. She states that her services were unlawfully terminated by the FAO on 30th September 2011.

Complaint to the Commissioner General of Labour

Aggrieved by the said decision of the FAO, the Petitioner made a complaint to the 2nd Respondent, the Commissioner General of Labour on 25th November 2011. The Petitioner states that in response to a notice dated 10th February 2012 sent by the Deputy Commissioner of Labour to appear at a formal inquiry in relation to the complaint made by the Petitioner, the FAO had sent the Ministry of External Affairs a *Note Verbale* dated 27th February 2012 marked 'P5b', wherein, the FAO had taken up the position that they are entitled to immunities and privileges under the following instruments:

1. The Constitution of the FAO signed in Quebec on 16th October 1945, to which Sri Lanka has acceded on 21st May 1948;
2. The Agreement between FAO and Sri Lanka regarding FAO representation accepted by Sri Lanka on 1st December 1978.

The FAO has also made reference to the fact that the Agreement between the FAO and the Government of Sri Lanka, which makes reference to the Convention on Privileges and Immunities of Specialised Agencies, provides "*in clear terms in Article I Section 4 that: "the Specialised Agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as, in any particular case, they have expressly waived their immunity."*

The position of the FAO in the said *Note Verbale* is that the abovementioned international treaties grant to the FAO unrestricted immunity from the jurisdiction of national courts and that matters arising from employment disputes are governed by the internal rules of the Organisation (Constitution, General Rules of the

Organisation, Staff Regulations, Staff Rules, Manual Sections and Administrative Issuances) to the exclusion of any national law. The rationale for this as provided in the said *Note Verbale* is as follows:

“If the laws of any Member Nation were held to be applicable to the employment relations between FAO and its personnel, and the national courts competent to adjudicate on such disputes, it would harm the concept of an independent international civil service and prevent the proper functioning of the FAO. It is for this reason that the Constitution of FAO, like that of other international organisations, prescribed the governance mechanisms by which individual Member Nations may influence the functioning of the Organisation, and to prohibit any attempt by individual member Nations to exert influence outside the framework of those mechanisms.”

The Petitioner states that since there was no representation or appearance by the FAO before the Commissioner General of Labour, the Petitioner was advised by the officials of the Department of Labour to institute proceedings before the Labour Tribunal.

Letter issued by the Ministry of Foreign Affairs in 2006

The Petitioner states that the Ministry of Foreign Affairs had issued a letter dated 26th July 2006 marked 'X3' in respect of another employee who was similarly circumstanced as the Petitioner. In 'X3', the Ministry of Foreign Affairs had stated as follows:

“Government of Sri Lanka wishes to reaffirm that it will apply to the staff, funds, property and assets of the FAO the provisions of the Convention on the Privileges and Immunities of Specialised Agencies in accordance with the Constitution of the FAO (1948) and the Agreement between the FAO and Sri Lanka regarding the FAO Representation of 1978.

However, in the interpretation and the application of these instruments, Sri Lanka will be guided by the current status of international law and the practice pertaining to claims of immunity. International law and State practice do not recognise matters arising out of termination of contracts of employment as

falling within the scope of jurisdictional immunities. International organisations cannot be placed in a more favourable position than a State concerning the enjoyment of immunities in respect of such categories of disputes.

Accordingly, the question of imposing “its own system of laws, labour policies and social values” etc. referred to in the Note Verbale does not arise.”

Accordingly, although the Ministry of Foreign Affairs was of the view that the FAO was entitled to immunity under *the Convention on the Privileges and Immunities of Specialised Agencies in accordance with the Constitution of the FAO (1948)* and the *Agreement between the FAO and Sri Lanka regarding the FAO Representation of 1978*, it was of the view that the immunity afforded under these instruments could not be extended to matters arising out of contracts of employment, being *guided by the current status of international law and the practice pertaining to claims of immunity.*

The Petitioner states that by letter dated 19th March 2012 marked ‘**P5**’, she sought confirmation from the Ministry of Foreign Affairs if the above position reflects the current position of the Ministry of Foreign Affairs and that by letter dated 5th April 2012 marked ‘**X2**’, the Ministry of Foreign Affairs confirmed that position.

Application to the Labour Tribunal

The Petitioner states that she instituted an application before the Labour Tribunal on or about 28th March 2012, her complaint being that her services were terminated unlawfully and unjustly by the FAO. The Petitioner states that although the learned President of the Labour Tribunal issued notice on the employer, the FAO was not represented before the Labour Tribunal.

The Petitioner states that she had produced ‘**X2**’ and ‘**X3**’ during the course of her evidence before the Labour Tribunal. The Labour Tribunal had requested the presence of a representative from the Ministry of Foreign Affairs to confirm the contents of ‘**X3**’. The Petitioner states that on 24th June 2013, a Legal Officer from the Ministry of Foreign Affairs gave evidence before the Labour Tribunal and confirmed

the above position.¹ In response to a specific question by the Attorney-at-Law for the Petitioner whether matters arising out of the termination of employment do not come within the ambit of jurisdictional immunity, the representative from the Ministry of Foreign Affairs had responded in the affirmative.

Due to non-appearance by the FAO, the Labour Tribunal had proceeded to hear the matter *ex parte*, and subsequently made an order in favour of the Petitioner declaring that the services of the Petitioner had been terminated unjustly and unlawfully. The Labour Tribunal had awarded the Petitioner compensation in a sum of Rs. 2,370,857.19 by its Order dated 15th November 2013 marked 'X7'.

Request by the Petitioner to the 2nd Respondent to enforce the Order of the Labour Tribunal

The Petitioner states that the FAO did not comply with the Order of the Labour Tribunal, even though the said Order was duly conveyed to the FAO. The Petitioner had thereafter informed the Respondents of the FAO's failure to comply with the said Order and moved that the Respondents enforce the said Order of the Labour Tribunal in terms of the provisions of the Industrial Disputes Act.

The decision of the Commissioner General of Labour

The Respondents have produced a letter dated 3rd May 2016 marked '2R1', sent by the Ministry of Foreign Affairs to the Department of Labour, informing them of the legal position with regard to the jurisdictional immunities enjoyed by the FAO. '2R1' appears to be in response to a query raised by the Department of Labour in respect of the position on immunity of the FAO. In the said letter, the Ministry of Foreign Affairs had taken up the position that the FAO enjoys immunity due to:

- (1) the Agreement between the FAO and the Government of Sri Lanka; and
- (2) the Constitution of the FAO signed in Quebec on 16th December 1945.

¹ Vide proceedings before the Labour Tribunal dated 24th June 2013 marked 'X5'.

By letter dated 9th June 2016, marked 'P7', the 1st Respondent had informed the Petitioner that no action can be taken against the FAO as the said Organisation was immune from legal action under:

- 1) The Agreement between the Government of Sri Lanka and the FAO dated 1st December 1978;
- 2) The Constitution of the FAO signed in Quebec on 16th October 1945.

It appears that the basis for the decision contained in 'P7' is the advice contained in '2R1'. It must be noted that the position taken by the Ministry of Foreign Affairs in '2R1' appears to be contrary to that taken before the Labour Tribunal, in that '2R1' does not make any reference to an exception to the application of immunity to employment disputes.

Aggrieved by the decision of the Commissioner General of Labour in 'P7', the Petitioner filed this application seeking a Writ of Certiorari to quash the said decision and a Writ of Mandamus directing the Respondents to take steps in terms of the Industrial Disputes Act to enforce the said award.

The primary issue that must be considered by this Court is whether the Respondents acted illegally or irrationally when they came to the conclusion that the Order of the Labour Tribunal was unenforceable on the basis that the FAO had immunity from judicial proceedings before the domestic Courts of Sri Lanka.

Legal framework of immunity enjoyed by International Organisations

Before proceeding to consider the applicability of the above two instruments to the facts of the present case, I will briefly lay down the legal framework surrounding the granting of immunity to International Organisations before the domestic Courts of Sri Lanka.

What is an International Organisation?

Although there is no strict legal definition of what constitutes an International Organisation, legal scholars have attempted to provide a few defining features shared by what are usually considered as '*International Organisations*'. As stated in **Bowett's Law of International Institutions**:²

"International organisations exist in a variety of forms, and the term is capable of reflecting different situations. Commentators are in general agreement that for an entity to qualify as an international organisation, it must have the following characteristics:

- *Its membership must be composed of states and/or other international organisations;*
- *It must be established by treaty or other instrument governed by international law, such as a resolution adopted in an international conference;*
- *It must have an autonomous will distinct from that of its members and be vested with legal personality; and*
- *It must be capable of adopting norms (in the broadest sense) addressed to its members."*³

Therefore, International Organisations are generally creatures of treaty or other international instruments, governed by International law. Their role and mandate will be defined and provided for within the scope of the instrument that created them, and their membership will be generally composed of States and/or other international organisations.

² Philippe Sands Q.C. and Pierre Klein, *Bowett's Law of International Institutions* [6th Edition, 2009] Sweet & Maxwell.

³ *Ibid.* pages 15-16.

Legal personality under domestic law

The ability for International Organisations to possess legal personality would depend on whether they meet the requirements which that legal system posits for acceptance of the Organisation's personality.⁴ This is explicitly provided for in the constituent treaties of international organisations. For example, in terms of Article 104 of the United Nations Charter, '*The Organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.*'

The Sri Lankan legal system is dualist in nature, and it therefore treats municipal law and international law as two distinct systems of law. In **Singarasa v Attorney General**,⁵ Chief Justice Sarath N. Silva with four other Judges of the Supreme Court agreeing, held as follows:

"...the framework of our Constitution to which reference would be made presently, which is based on the perspective of municipal law and international law being two distinct systems or the dualist theory as generally described. The Classic distinction of the two theories characterized as monist and dualist is that in terms of the monist theory international law and municipal law constitute a single legal system. Therefore the generally recognized rules of international law constitute an integral part of the municipal law and produce direct legal effect without any further law being enacted within a country. According to the dualist theory international law and municipal law are two separate and independent legal systems, one national and the other international. The latter being International law regulates relations between States based on customary law and treaty law. Whereas the former, national law, attributes rights and duties to individuals and legal persons deriving its force from the national Constitution."

"It is seen from these Articles [Articles 3, 4 and 5] forming its effective framework that our Constitution is cast in a classic Republican mould where Sovereignty within and in respect of the territory constituting one country, is

⁴ Jan Klabbbers, *An Introduction to International Institutional Law* [2nd Edition, 2009], Cambridge University Press, page 44.

⁵ [2013] 1 Sri LR 245

*reposed in the People. Sovereignty includes legislative, executive and judicial power, exercised by the respective organs of government for and in trust for the People. There is a functional separation in the exercise of power derived from the Sovereignty of the People by the three organs of government, the executive, legislative and judiciary. The organs of government do not have plenary power that transcends the Constitution and the exercise of power is circumscribed by the Constitution and written law that derive its authority therefrom. This is a departure from the monarchical form of government such as the UK based on plenary power and omnipotence...**international treaties entered into by the President and the Government of Sri Lanka as permitted by and consistent with the Constitution and written law would bind the Republic qua State but have to be implemented by statute enacted under the Constitution to have internal effect.**"*

Therefore, under the Sri Lankan legal framework, although International instruments may bind the State upon ratification, they can only be given effect to internally, as a part of the domestic legal framework, through enabling legislation duly enacted by Parliament. This principle is no different in respect of International instruments relating to International Organisations.

As stated in **Bowett's Law of International Institutions**:

"By definition, the "national" legal personality of international organisations is to produce effects in domestic legal orders. The process through which such personality is recognised and given effect in national orders varies according to a number of factors...Being bound by the legal instruments – generally the constituent instrument - in which the organisation's legal personality is established, the member states are to grant it ipso facto recognition in their domestic legal order. This will not raise any difficulty in monist states, where the rules of international law binding on the state can be invoked directly before national tribunals.⁶

*In contrast, such **a recognition will only be possible in dualist states if the international norm from which the "national" legal personality of a given***

⁶ Supra; page 481.

*intergovernmental organisation flows has been incorporated in that state's domestic legal order. The most striking formulation of this principle can be found in the House of Lord's 1989 decision in the ITC case, finding that, "the ITC as a matter of English law owes its existence to the Order in Council. That is what created the ITC in domestic law.."*⁷ *In the United Kingdom, the adoption of an Order in Council conferring upon international organisations to which that state becomes a member the "legal capacities of a body corporate,"*⁸ *or the enactment of a specific piece of legislation in respect to a given organisation are the two ways in which the juridical personality of international organisations is given effect in that country's legal order."*⁹

Generally in a dualist State, the legal personality of an International Organisation would therefore be dependent on its recognition through domestic legislation. Acceding to the Constitution of an International Organisation would not *ipso facto* grant legal personality to an International Organisation in the domestic legal framework. The ability of Courts to give effect to the provisions of such instruments, including those which grant privileges and immunities to such International Organisations, would be dependent on the steps taken by the legislature to enact enabling legislation of a specific or general character.

Jurisdictional immunity

A plea of jurisdictional immunity before domestic Courts, if upheld, is a legal impediment to a Court's function in respect of the party pleading immunity. It is essentially a tool to deprive an aggrieved party from their right of access to Courts.

In respect of State Immunity or Sovereign Immunity, the rationale for granting immunity to States in the domestic Courts of other states is founded on the basis that all States are equal. As observed by the Supreme Court in **The British High Commission v. Ricardo Wilhelm Michael Jansen**:¹⁰

⁷ J.H. Rayner v Department of Trade, October 26, 1989, 81 ILR 709 [per Lord Oliver of Aylmerton]

⁸ By virtue of the International Organisations Act 1968.

⁹ *Bowett's* paragraph 15-018; page 481.

¹⁰ SC Appeal No. 99/2012; SC Minutes of 10th July 2014.

“The Latin maxim ‘par in parem non habet imperium’ (one equal cannot exercise authority over another) neatly summarizes the justification for sovereign immunity.”

The rationale for affording jurisdictional immunity to International Organisations is different. As it cannot be argued that an International Organisation is equivalent to a State, jurisdictional immunity is justified on the theory of ‘*functional necessity*.’ The general idea behind this theory is that “*Organisations enjoy immunities and privileges as are necessary for their effective functioning: international organisations enjoy what is necessary for the exercise of their functions in the fulfilment of their purposes.*”¹¹

In Sri Lanka, a plea of jurisdictional immunity, if upheld, will have the effect of disabling the judicial power of the people which forms part of the Sovereignty of the People through Article 4(c) by ousting the jurisdiction of Courts. Therefore, a plea of immunity must be armed with the adequate and effective domestic legislation which can give effect to it.

Diplomatic Privileges Act No. 9 of 1996

In Sri Lanka, the starting point for the granting of immunity is the Diplomatic Privileges Act No. 9 of 1996 (**the Act**). As observed by the Supreme Court in **The British High Commission v. Ricardo Wilhelm Michael Jansen**¹²

“The Diplomatic Privileges Act No. 9 of 1996 is Sri Lanka’s response to its dualist practice of enacting domestic legislation to give effect to its international obligations under the Vienna Convention on Diplomatic Relations of 1961.”

The Vienna Convention on Diplomatic Relations of 1961 is specifically in relation to relationships between States and does not contain any reference to immunity that should be afforded to International Organisations. However, Section 4 of the Act recognises a mechanism for the Government of Sri Lanka to give effect to immunity

¹¹ An Introduction to International Institutional Law (Supra).

¹² SC Appeal No. 99/2012; SC Minutes of 10th July 2014.

provisions in Agreements entered into with inter-governmental and international organisations.

Section 4 of the Act reads as follows:

(1) Where the Government of Sri Lanka has entered into an agreement with any inter-governmental or international organization providing for the grant of any immunities and privileges, to the officers or agents or property of such organization, the Minister may, by Order published in the Gazette, and to the extent necessary to give effect to the terms of such agreement, declare that such of the provisions of this Act as are specified in such Order shall apply to such officers, agents and property, of such organization as are, or is, specified in such Order, to such extent as is specified therein, and upon the making of such Order such, of the provisions of this Act as are specified therein, shall, mutatis mutandis, apply to such officers, agents and property of such Organization as are, or is, specified therein.

(2) Every Order made under this section shall recite or embody the terms of the agreement in consequence of which such Order, was made and shall come into force on the date of publication of such Order, or on such later date as may be specified therein, and shall remain in force for so long, and so long only, as the agreement in consequence of which such Order was made remains in force."

Section 4(1) of the Act presupposes the existence of an Agreement providing for granting of immunity between the Government of Sri Lanka and the International Organisation claiming immunity. A Section 4(1) Order is therefore a mechanism to grant immunity to such Organisation, **to the extent necessary to give effect to the terms of such agreement**. The Minister is also empowered to specify to what extent, the provisions of the Act can apply to the said Organisation.

According to Section 5(1) of the Act, an Order made under Section 4(1) shall as soon as convenient after its publication in the Gazette be placed before Parliament for approval. An Order which is not approved shall be considered rescinded from the date of disapproval.

In International Water Management Institute v. Kithsiri Jayakody¹³ the Supreme Court was confronted with a similar issue to that in the present application, arising from the unlawful termination of services of an employee of the International Water Management Institute. Unlike in the present application, in that case, the International Water Management Institute appeared before the Kaduwela Labour Tribunal and took up a preliminary objection on the basis that it was entitled to immunity under and in terms of the International Irrigation Management Act No. 6 of 1985, as amended by Act No. 50 of 2000, read with the “Charter and Founding Documents” of the Appellant’s predecessor, the International Irrigation Management Institute. The Institute in that case also submitted that its plea of immunity is strengthened by the Order made by the relevant Minister dated 10th December 1997 in terms of Section 4(1) of the Act.

The Labour Tribunal and subsequently the Provincial High Court rejected the plea of immunity on the basis that the Section 4(1) Order was not placed before Parliament for approval. However, the Supreme Court went on to hold that a Section 4(1) Order was capable of granting immunity even in the absence of being presented for approval by the Parliament, unless and until such Order is rescinded. The Supreme Court held that:

*“Of course, I must advert to the fact that there is absolutely no evidence that the order made by the Minister was ever placed before Parliament, and there is no certificate under the hand of the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs (currently External Affairs) which would have been in terms of section 6 of the Diplomatic Privileges Act which would have amounted to conclusive proof of the fact that the Appellant enjoyed diplomatic immunity. However, in my opinion, **the order under section 4(1) of the Act, if made validly, would come into force when published in the Gazette, and would remain in force until and unless it is disapproved by Parliament. The failure to place the order before Parliament does not affect its coming into force.** It is also my opinion that a certificate under section 6, which would have facilitated proof of immunity, is not indispensable to proving the existence of immunity, if it can be established by other evidence, as the Appellant has succeeded in doing in this appeal.”*

¹³ SC Appeal No. 11/2011; SC Minutes of 25th March 2014.

*...the step taken by the Minister of Foreign Affairs in 1997 to make an order in terms of section 4(1) of the Diplomatic Privileges Act of 1996 **was a positive step to comply with the obligation of the Government of Sri Lanka** under section 33 of the International Water Management Institute Act No. 6 of 1985, which expressly provided that “the Government shall take all such steps as are necessary to ensure that (a) the Institute; and (b) the Director General, Consultants and officers and servants of the Institute, are accorded subject to the provisions of the Constitution all such rights, privileges and immunities as the Government has agreed to, accord to such Institute, the Director-General, consultants and officers and servants of the Institute, by the Memorandum of Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Ford Foundation, acting on behalf of the International Water Management Institute Support Group, for the establishment of an International Institute for Research and Training in Irrigation Management, signed on 1st September, 1983.”*

It must be noted that in that case, the enabling Act, the International Irrigation Management Act No. 6 of 1985, as amended by Act No. 50 of 2000, specifically provided for the grant of all such rights, privileges and immunities as the Government has agreed to. Nonetheless, the Supreme Court went onto to hold as follows:

*“I have serious doubts as to whether the obligation cast on the Government of Sri Lanka by section 33 of the International Irrigation Management Act 1985, was by itself, sufficient to support a plea of immunity from suit in the Labour Tribunal or any other court or tribunal. **In my view, it was only a provision that imposed on the government a legal obligation in the municipal sphere which a Court of law, tribunal or other institution in Sri Lanka could take cognizance of which is into accord with an obligation the government had incurred in the international plain by entering to the Memorandum of Agreement with the Ford Foundation on behalf of the International Irrigation (Water) Management Institute Support Group.***

*Having said that, I answer question (b) in the affirmative,¹⁴ and hold that the High Court did err in not coming to the finding that the International Irrigation Management Institute Act No. 6 of 1985, as amended by Act No. 50 of 2000, displayed the legislature's unambiguous intention to grant the said immunity, but add the rider **that that does not mean that section 33 of the International Irrigation Management Institute Act, by itself, had the effect of conferring the Appellant immunity from suit.**"*

Thus, even though there existed an enabling Act which specifically provided for the grant of all such rights, privileges and immunities, the Supreme Court was of the view that, that by itself is *"not sufficient to support a plea of immunity from suit in the Labour Tribunal or any other court or tribunal."*

The Supreme Court has therefore made it abundantly clear that the act of granting International Organisations immunity from jurisdiction before the Domestic Courts of Sri Lanka must be done in accordance with the specific mechanism provided by the Act.

Furthermore, Section 4(1) of the Act states that the 'Minister may' declare that the provisions of the Act shall apply to the extent necessary to give effect to the terms of such provisions of any Agreement with the International Organisation, thereby affording the Minister a discretion to take a positive step to give effect to any obligations arising from the terms of such Agreement. Therefore, the granting of immunity to an International Organisation is effected by a positive act, and certainly cannot be implied through the provisions of an Agreement between the Government of Sri Lanka and the International Organisation.

Resort to customary International Law

The above position can be distinguished from the position taken by the Supreme Court in **The British High Commission v. Ricardo Wilhelm Michael Jansen**.¹⁵ The Supreme Court in that case found that the applicable rules were those of sovereign

¹⁴ Question (b) – 'Did the High Court err in not coming to the finding that the International Irrigation Management Institute Act No. 6 of 1985, as amended by Act No. 50 of 2000, displayed the legislature's unambiguous intention to grant the said immunity'

¹⁵ Supra.

immunity and not diplomatic immunity. In the absence of legislation specifically dealing with the question of State or Sovereign Immunity, the Court looked to customary international law for interpretative guidance in order to give substance to the concept of Sovereign Immunity which is very much a part of our law.¹⁶ The Supreme Court found justification for sovereign immunity in the Latin maxim '*par in parem non habet imperium*' (one equal cannot exercise authority over another).

Drawing examples of State practice, the Supreme Court held as follows:

"The maintenance of security in the mission could not be classified as merely auxiliary but in my view since the duties of the Respondent were integral to the core sphere of sovereign activity, the contract of employment was not effected in the capacity of a private citizen and the functions of the Respondent were enlisted in the interest of the public service of the UK Government and on these premises I am irresistibly drawn to the inescapable conclusion that immunity becomes applicable in the instant case."

However, where there is a specific mechanism provided by the law, jurisdictional immunity for international organisations cannot be inferred or implied through custom.

As held by the Supreme Court of Canada in the case of **Amaratunga v. Northwest Atlantic Fisheries Organisation**.¹⁷

"In the case of international organizations, unlike that of states, the prevailing view at present is that no rule of customary international law confers immunity on them. International organizations derive their existence from treaties and the same holds true for their rights to immunities.¹⁸ Such an organization must operate on the territory of a foreign state and through individuals who have nationality and is therefore vulnerable to interference, since it possesses neither territory nor a population of its own.¹⁹ This reality makes immunity essential to the efficient and independent functioning of

¹⁶ See BASL Journal 2020 Volume XXV page 433; S. Dias.

¹⁷ [2013] 3 SCR 866.

¹⁸ H. Fox, *The Law of State Immunity* (2nd Ed. 2008), at pp. 725-26

¹⁹ *Ibid*; at page 724

international organizations. It also shapes the immunities and privileges that are granted to international organizations. Such immunities and privileges are created through a complex interplay of international agreements and the national law of host states.”²⁰

Reasons contained in ‘P7’ to grant immunity to the FAO

I shall now consider (a) the Constitution of the FAO signed in Quebec on 16th October 1945, and (b) the Agreement between the FAO and the Government of Sri Lanka dated 1st December 1978, which are the two documents that were relied upon by the Respondents to arrive at their decision contained in ‘**P7**’.

Constitution of the FAO signed in Quebec on 16th October 1945

There is no doubt that the FAO is an International Organisation, having been established by the United Nations Conference on Food and Agriculture, which met in May-June 1943. There is also no dispute between the parties that it has its own Constitution dated 16th October 1945 and that Sri Lanka has acceded to the Constitution of the FAO on 21st May 1948.

Article XVI of the Constitution of the FAO contains the following provisions relating to the Legal Status of the FAO:

1. *The Organisation shall have the capacity of legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution;*
2. *Each **Member nation undertakes, insofar be possible under its constitutional procedure, to accord to the Organisation all immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit, and exemptions from taxation;***

²⁰ See W. M. Berenson, “Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS”, in H. Cissé, D. D. Bradlow and B. Kingsbury, eds., *The World Bank Legal Review* (2012), vol. 3, 133. See also L. Preuss, “The International Organizations Immunities Act” (1946), 40 *Am. J. Int’l L.* 332, at p. 345.

3. *The Conference shall make provision for the determination by an administrative tribunal of disputes relating to the conditions and terms of appointment of members of the staff."*

It must be noted here that the legal obligation on member states to accord to the FAO, all immunities and facilities which it accords to diplomatic missions, is only insofar as it is consistent with its Constitutional provisions. This further buttresses the fact that immunity to the FAO cannot, under any circumstance, be implied in the absence of the constitutionally mandated mechanism provided for in the Act.

The Agreement between the FAO and the Government of Sri Lanka

Even where States have signed the international instruments establishing international organisations, "*while those agreements are of a multilateral character, it has often been found necessary to conclude a bilateral agreement with the host state in whose territory the headquarters or other offices of the organisations are maintained.*"²¹

The Ministry of Foreign Affairs has referred to an Agreement between the FAO and the Government of Sri Lanka in '2R1' and therefore 'P7' refers to such an Agreement dated 1st December 1978. However, it must be noted that the said Agreement was not produced before this Court. The learned Senior State Counsel has annexed with her written submissions dated 11th January 2019, a letter dated 13th December 2018 issued by the Ministry of Foreign Affairs in response to certain clarifications sought by the learned Senior State Counsel on the inconsistent positions taken by the Ministry of Foreign Affairs in respect of the jurisdictional immunity purportedly granted to the FAO. This letter appears to contain the final position of the Ministry of Foreign Affairs with regard to the issue on immunity. Although the Ministry of Foreign Affairs had stated that the said Agreement dated 1st December 1978 has been marked 'Annex I' the document marked 'Annex I' was an incomplete document dated 18th September 1978, issued by the Director-General of the FAO to the Minister of Agriculture and Lands, providing certain proposals on the "*Appointment of an FAO Representative in Sri Lanka*" which was due to constitute an Agreement upon its acceptance by the Government of Sri Lanka. The letter of acceptance

²¹ *Bowett's - supra; page 492.*

however was not submitted. Upon this Court seeking clarifications from the learned Senior State Counsel, a letter dated 23rd September 2020 issued by the Ministry of Foreign Affairs was produced before this Court. The said letter contained six annexures, and the fourth annexure appears to be the acceptance letter to the document marked 'Annex I'. I must note at this stage that none of these annexures were referred to or made available to the Respondents by the Ministry of Foreign Affairs.

The said Acceptance letter dated 4th January 1979 issued by the *Ambassador for Sri Lanka in Italy to the Director General* of the FAO in Rome in response to the letter dated 18th September 1978 by the FAO to the Ministry of Agriculture and Lands, states as follows:

"I have the honour to state that the above proposals are acceptable to the Government of Sri Lanka and therefore your letter and this reply constitute an agreement between the Government of Sri Lanka and the FAO."

Clause 5 thereof states as follows:

"(5) To the extent that it is not already bound to do so, the Government of Sri Lanka agrees to apply to the Organisation, its staff, funds, property and assets, the provisions of the Convention on the Privileges and Immunities of the Specialised Agencies. The FAO Representative shall be accorded the treatment provided for in Section 21 of the said Convention. The Government also agrees to grant to FAO, and to the FAO Representative and his staff, privileges and immunities not less favourable than those granted to any other international organisation and its staff in Sri Lanka."

The aforementioned letter dated 23rd September 2020 by the Ministry of Foreign Affairs also makes reference to three other Agreements between the Government of Sri Lanka and International Organisations including the FAO.

The first is an Agreement dated 16th December 1954 between the Government of Ceylon and The United Nations, The International Labour Organisation, The FAO, The United Nations Educational, Scientific and Cultural Organisation, The International

Civil Aviation Organisation and The World Health Organisation. The scope of the Agreement appears to be contained in the preamble, which reads as follows:

“Desiring to give effect to the resolutions and decisions relating to technical assistance of the Organisations, which are intended to promote the economic and social progress and development of peoples.”

Article V of the said Agreement titled “Facilities, Privileges and Immunities” contains the following immunity clause applicable to all the Organisations named in the Agreement:

“The Government, insofar as it is not already bound to do so, shall apply to the Organisation(s), their property, funds and assets, and to their officials including technical assistance experts, the provision of the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialised Agencies.”

The said Agreement had been signed by the Acting Permanent Secretary of the Ministry of Defence and External Affairs and the Representative in Ceylon, United Nations Technical Assistance Board, and has been duly presented to Parliament by the Minister of External Affairs.

It must be noted that although this is not the Agreement between the Government of Ceylon and the FAO that has been referred to in ‘P7’, this Agreement signed on 16th December 1954 may constitute an Agreement between the FAO and the Government of Sri Lanka, and an Order under Section 4(1) of the Act may be published by the Minister to give effect to Article V of the Agreement in respect of the FAO, to the extent specified therein.

The second Agreement is titled ‘Basic Agreement between the Government of Ceylon and the United Nations/ FAO World Food Programme Concerning Assistance from the World Food Programme.’ The scope of this Agreement appears to be limited to the assistance rendered by the World Food Programme.

The third Agreement is the Agreement between the Government of Sri Lanka and the United Nations Development Programme (UNDP) signed in 1990. The scope of the said Agreement is contained in Article I which reads as follows:

“This Agreement embodies the basic conditions under which the UNDP and its Executing Agencies shall assist the Government in carrying out its development projects, and under which such UNDP-assisted projects shall be executed. It shall apply to all such UNDP assistance and to such Project Documents or other instruments (hereinafter called Project Documents) as the Parties may conclude to define the particulars of such assistance and the respective responsibilities of the Parties and the Executing Agency hereunder in more detail in regard to such projects.”

The learned Senior State Counsel has relied on the immunity provision contained in the said Agreement - i.e. Article IX - to support the position that the FAO is entitled to jurisdictional immunity.

Article IX reads as follows:

- “1. The Government shall apply to the United Nations and its organs, including the UNDP and UN subsidiary organs acting as UNDP Executing Agencies, their property, funds and assets, and to their officials, including the resident representative and other members of the UNDP mission in the country, the provisions of the Convention on the Privileges and Immunities of the United Nations.”*

- 2. The Government shall apply to each Specialised Agency acting as an Executing Agency, its property, funds and assets, and to its officials, the provisions of the Convention on the Privileges and Immunities of the Specialised Agencies, including any Annex to the Convention applicable to such Specialised Agency. In case the International Atomic Energy Agency (IAEA) acts as an Executing Agency, the Government shall apply to its property, funds and assets, and to its officials and experts, the Agreement on the Privileges and Immunities of the IAEA.”*

The Respondents have not produced any material to show that the FAO's presence in Sri Lanka, and the role exercised by the FAO in Sri Lanka has any nexus to the UNDP. Therefore, even if it were to be accepted that the said Agreement between the UNDP and the Government of Sri Lanka was to extend to the FAO, it would have to be limited to those instances described in the Scope of the Agreement.

Order under the Diplomatic Privileges Act

As observed above, accession to the Constitution of the FAO, or entering into an Agreement with the FAO which provides for the grant of privileges and immunities to the FAO by itself is not sufficient to uphold a plea of immunity, ousting the jurisdiction of Courts and thereby restricting the right of access of a citizen to a Court of Law. There must therefore exist an Order made under Section 4(1) of the Act.

The Respondents have produced Extraordinary Gazette No. 1987/23 dated 5th October 2016, containing several Orders issued by the Minister of Foreign Affairs under Section 4 of the Act. The Orders contained in the said Gazette are in respect of the following International Organisations:

- International Water Management Institute
- United Nations Development Programme (UNDP)
- Colombo Plan Bureau
- International Labour Organisation
- International Committee of the Red Cross
- World Conservation Union – IUCN (International Union for Conservation of Nature and Natural Resources)
- Commission of the European Communities, Economic Development Cooperation Fund.

Even though none of the Orders contained in the said Gazette provides any reference to the FAO or to any Agreement between the Government and the FAO to which I have referred to earlier, or to the Agreement between the FAO and the Government referred to in 'P7', the learned Senior State Counsel has relied on the Section 4(1) Order made in respect of the UNDP to support the argument that the

FAO is entitled to jurisdictional immunity, on the basis that the FAO is an executing agency of the UNDP.

The relevant sections of the said Order are reproduced below:

“By virtue of the powers vested in me by Section 4 of the Diplomatic Privileges Act, No. 9 of 1996, I Mangala Samaraweera, Minister of Foreign Affairs, do, by this Order, declare that the provisions of the aforesaid Act shall apply in respect of the United Nations Development Programme, to the extent necessary to give effect to the terms of the Agreement, entered into with the Government of the Democratic Socialist Republic of Sri Lanka, on 20th March 1990, the relevant articles of which Agreement are recited in the Schedule hereto.”

SCHEDULE

AGREEMENT BETWEEN THE GOVERNMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA AND THE UNITED NATIONS DEVELOPMENT PROGRAMME

ARTICLE IX

PRIVILEGES AND IMMUNITIES

1. *The Government shall apply to the United Nations and its organs, including the UNDP and UN subsidiary organs **acting as UNDP Executing Agencies**, their property, funds and assets, and to their officials, including the resident representative and other members of the UNDP mission in the country, the provisions of the Convention on the Privileges and Immunities of the United Nations.*
2. *The Government shall apply to **each Specialised Agency acting as an Executing Agency**, its property, funds and assets, and to its officials, the provisions of the Convention on the Privileges and Immunities of the Specialised Agencies, including any Annex to the Convention applicable to such Specialised Agency. In case the International Atomic Energy Agency (IAEA) acts as an Executing Agency, the Government shall apply to its property, funds and assets, and to its officials and experts, the Agreement on the Privileges and Immunities of the IAEA.*

3. *Members of the UNDP mission, in the country shall be granted such additional privileges and immunities as may be necessary for the effective exercise by the mission of its functions as mutually agreed.”*

Thus, while all Orders made under Section 4(1) of the Act and set out in the aforementioned Gazette relate to a specific international organisation named in such Order, and to a specific agreement that the Government of Sri Lanka has entered into with those organisations, there is no specific Order in favour of the FAO nor is there any specific reference to the FAO in the Order made in favour of the UNDP. It is somewhat inconceivable that the legislature would allow for something which impacts the rights of the citizenry as much as the ouster of the jurisdiction of the Courts of Sri Lanka to be effected through a vague reference to a provision of an Agreement in respect of another International Organisation.

On the material placed before this Court, it is clear that the FAO and the UNDP are separate organisations by virtue of the fact that they have separate international instruments creating and governing them. *Even if* the argument of the learned Senior State Counsel was accepted, the immunity granted through the said Order in favour of the UNDP would only be applicable where the FAO acts as an Executing Agency of the UNDP, or a Specialised Agency acting as an Executing Agency of the UNDP, a link which has not been established before this Court.

Conclusion

In the above circumstances, I am of the view that in arriving at its decision in 'P7', the Respondents have failed to take into consideration the following material factors:

- a) That accession by Sri Lanka to the Constitution of the FAO is insufficient by itself to grant immunity to the FAO;
- b) That an agreement that Sri Lanka may have with the FAO is insufficient by itself to grant immunity to the FAO;
- c) That there must exist an Order under Section 4(1) of the Act granting immunity to the FAO if the Respondents are to refrain from enforcing the Labour Tribunal award;

- d) Whether the Order under Section 4(1) made in favour of the UNDP is adequate to enable immunity to be afforded to the FAO.

As stated in **De Smith's Judicial Review**:

"An administrative decision or other exercise of a public function is unlawful under the broad chapter head of "illegality" if the decision-maker:

(a) Misinterprets a legal instrument relevant to the functions being performed;

(b) – (d) ...

*(e) takes into account irrelevant considerations or fails to take account of relevant considerations."*²²

*"If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised."*²³

I am therefore of the view that 'P7' is illegal. I accordingly issue a Writ of Certiorari to quash 'P7'. Whether the FAO is an executing agency of the UNDP and is entitled to immunity in terms of the Order made in favour of the UNDP and especially its Schedule, is a question of fact which this Court cannot go into in this application. I therefore direct the 2nd Respondent to consider all of the above and arrive at a suitable decision in terms of the law. The 2nd Respondent may in that regard, seek the views of the Ministry of Foreign Affairs and afford the Petitioner an opportunity of placing any material before it.

I make no order with regard to costs.

President of the Court of Appeal

²²Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, De Smith's Judicial Review [8th Edition, 2018] Sweet and Maxwell, page 245.

²³ Ibid; page 305.